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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

April 17, 2002

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of written *Ex Parte* Presentation by the Competitive Telecommunications Association
CC Docket Nos.: 01-338, 96-98 & 98-147

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, the Competitive Telecommunications Association ("CompTel"), by its attorneys, submits this notice of a written *ex parte* presentation in the above-referenced proceedings. On April 16, 2002, the attached documents were distributed to Kyle Dixon, Matthew Brill, Jordan Goldstein, Dan Gonzalez, Brent Olson, Thomas Navin, Michelle Carey, Jeremy Miller and Robert Tanner.

As required by Section 1.1206(b)(1), an original and two copies of this *ex parte* notification are provided for inclusion in the public record of each of the above-referenced proceedings.

DC01/DAUBT/180654.1

Please direct any questions regarding this matter to the undersigned.

Sincerely,

Todd D. Daubert

TDD:mla

Attachments

cc: Kyle Dixon
Matthew Brill
Jordan Goldstein
Dan Gonzalez
Brent Olson
Thomas Navin
Michelle Carey
Jeremy Miller
Robert Tanner

In the Matter of
Review of the Section 251 Unbundling Obligations of
Incumbent Local Exchange Carriers
CC Docket No. 01-338

Comments
of the

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

- **The Commission's overriding objective in this proceeding should be to determine how best to promote local telecommunications competition. (i)**
    - The empirical and policy truth is this – new entrants need non-discriminatory access to the full range of UNEs at TELRIC-based rates so that they can establish the market presence (*e.g.*, brand name, customer base, revenue stream, back-office systems) necessary to implement a long-term entry strategy, including the development of facilities-based alternative networks. (ii)
    - Another critical empirical and policy truth is this – it is not the goal of every new entrant, nor should it be, to construct a ubiquitous, redundant local exchange network. (ii)
        - For decades, the Commission has correctly recognized that the public interest is supported by many types of competitors, ranging from hybrid carriers who rely in part upon their own facilities, equipment and capabilities, to pure resellers who rely upon marketing prowess and efficient operations to offer consumers lower rates. (ii)
    - Ultimately, the Commission should leave it to the marketplace to sort out the optimum mix of competitive entry through self-provisioning, UNEs and resale. (ii)
- **Congress based the Act on the assumption that making UNEs available would foster long-term competition and investment in all types of facilities. (7-30)**
    - All forms of competition benefit consumers of telecommunications services, including when competitive carriers rely in part or in whole on the ILECs' facilities and services. Likewise, requiring incumbents to make UNEs available to new market entrants creates incentives (not disincentives) for investment by fostering competition, without which incumbents have no incentive to expand their networks or create new services. (7)
    - A central question for the Commission in determining whether to mandate the availability of a UNE should be whether the UNE will promote the rapid development of competition by a multitude of providers (*i.e.*, is availability of the UNE "rationally related to the goals of the [1996 Telecommunications] Act"?). As the FCC has often recognized, the Act contemplates three different market entry strategies – service resale, UNEs (wholesale entry) and facilities-based provision of service. These options replicate market entry strategies available to carriers in competitive telecommunications markets, such as long distance. (8-9)

- In passing the 1996 Act, Congress unequivocally rejected the idea that deregulating the ILECs, and particularly the Bell Companies, would encourage new entrants to build competing facilities. (7-8)
- The Act does not authorize the Commission to discriminate against entry by means of UNEs or resale in favor of the creation of new facilities. The Act "neither explicitly nor implicitly expresses a preference for one particular entry strategy." In short, the principal goal of the Act – and therefore, the Commission's primary obligation in implementing the Act– is to "ensure that *all* pro-competitive entry strategies may be explored." (8-13)
    - Although facilities deployment is the long-term objective of many competitive carriers, it bears emphasis that the Act does not require new entrants to own facilities nor does it favor facilities-based entry over other entry strategies based on resale or UNEs. (9)
- New entrants need UNEs in order to implement business plans to enter the local market and ultimately to construct alternative network. Local competition and competitors must have access to the full range of UNEs at TELRIC rates without any restrictions in order to sustain entry and place themselves in a position to begin constructing their own facilities. (13-17)
    - Removing UNEs from the mandatory list, or restricting their use by requesting carriers, will create a barrier to new entry and constitute a severe disincentive for competitive carriers to invest in alternative facilities-based networks. Congress adopted the 1996 Act based on its recognition that it would undermine competition and discourage the build-out of our national infrastructure to require new entrants to build their own networks from scratch at the outset. (13-14)
    - In the local market, the Act compels ILECs to be the wholesale providers because they are the only carriers in a position to do so. (14)
- The Act prohibits the Commission from considering whether requiring ILECs to unbundle network elements may deter investment by ILECs or requesting carriers. (17-28)
    - The Commission cannot consider factors that are inherently inconsistent with the fundamental assumptions upon which Congress founded the Act. (17-18)
        - Congress provided the Commission with discretion to consider additional factors in making its unbundling determination under Section 251(d)(2), but this discretion is not unlimited. Specifically, the Commission has no authority to rely on factors that Congress did not intend the Commission to consider. (17-18)

- The Commission cannot rely on a factor that is based on an assumption which is inherently inconsistent with an assumption upon which Congress based the Act, even if the Commission does not agree with the assumption underlying the Act. (18)

- It is fundamentally inconsistent with the Act to consider whether requiring ILECs to unbundle a network element may deter investment by both ILECs and other carriers. (18-25)

  - In carrying out its duties under Section 251(d)(2) to determine which network elements the ILECs must unbundle, the Commission cannot consider whether requiring ILECs to unbundle a network element may deter investment by both ILECs and other carriers. Congress did not intend for the Commission to entertain such a proposition, because it is inherently inconsistent with a fundamental assumption upon which the Act is based. The Commission cannot purport to implement a statutory regime by dismantling it based on the assumption that the regime will achieve the opposite result intended by Congress. Congress adopted the UNE regime because it will promote competition and network investment, and the FCC cannot use its limited authority to implement this regime by removing UNEs, or restricting their use, based on the theory that UNEs undermine competition and retard network investment. In effect, the FCC would be exercising its forbearance authority in violation of Section 10(d) were it to use this factor to justify the removal or paring back of the mandatory UNE list. (18-19)

  - Congress based the Act on the fundamental assumption that requiring the ILECs to provide nondiscriminatory access on an unbundled basis to network elements would foster the rapid development of competition in the local telephone services market. (19-20)

    - Section 271 confirms that Congress based the Act on the assumption that mandatory unbundling requirements facilitate competition. (20)

    - The duty to provide unbundled access to local loop, local transport and local switching under Section 271 is absolute: the BOCs must provide access to these network elements regardless of whether the network elements satisfy the impair standard of Section 251(d)(2). The Commission has no authority under Section 271 to place conditions or limits on the duty of

a BOC to provide unbundled access to local loop, local transport and local switching as required by the "competitive checklist." This point was so important to Congress that it added Section 271(d)(4), which provides that the "Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." Congress emphasized the importance of this unbundling requirement by explicitly forbidding the Commission from exercising its forbearance authority with respect to Section 271 until both Section 251(c) and Section 271 have been fully implemented. (20-21)

- The absolute unbundling duty of a Bell Company does not end once its application for interLATA authority is granted. (21)
- The decision by Congress to impose an absolute unbundling obligation upon the most ubiquitous ILECs in the nation – the Bell Companies – with respect to three of the most important network elements – loops, transport and switching – under Section 271 reflects the fundamental assumption upon which Congress based the Act: mandatory unbundling fosters the rapid development of competition in the local telephone services market. (22)
- The language and structure of the rest of the Act confirm what Section 271 demonstrates. The Commission has recognized that the UNE regime "serves a crucial role in opening local markets to competition." In creating the UNE regime, Congress defined "network elements in Section 153(29), established the terms and conditions pursuant to which ILECs must make UNEs available in Section 251(c)(3), and instructed the Commission to identify which network elements must be made available to requesting carriers on an unbundled basis by applying the impair standard in Section 251(d)(2). (22-23)

- Section 706 does not provide the Commission with independent authority to consider "additional factors" under Section 251(d)(2) that are fundamentally inconsistent with the Act itself. (25-27)
  - Sections 251 and 706 are based on the same assumption, and Section 706 explicitly states that it is consistent with Section 251. (26)

- The plain language of Section 706 makes clear that the Commission can only encourage the deployment of advanced telecommunications capability by following the principle upon which Congress based Sections 271 and 251: requiring ILECs to provide nondiscriminatory access on an unbundled basis to network elements fosters the rapid development of competition. (26)
- Consideration of Section 706 could only lead the Commission to increase the unbundling obligations of the ILECs, because Section 706 is based on the assumption that requiring ILECs to provide nondiscriminatory access on an unbundled basis fosters competition. (26-27)

- The Act provides no mechanism for the Commission to consider whether requiring ILECs to unbundle network elements harms competition by creating disincentives for investment. (27-28)
  - None of the market-opening provisions in the Act grants the Commission discretion to consider whether imposing unbundling requirements on ILECs, particularly with respect to innovative, new facilities, may deter investment by both ILECs and others. (27-28)
    - The Commission has no discretion under Section 153(29) to limit or modify the definition of "network element." The Commission has no discretion under Section 271 to limit or modify the unbundling obligations of the BOCs. (27-28)
    - The Commission has no discretion under Section 251(c)(3) to limit or modify the terms and conditions pursuant to which ILECs must make UNEs available. (27-28)
    - Thus, the Commission cannot limit the unbundling obligations of ILECs pursuant to Section 706, because the Commission has no discretion under Section 706 to encourage the deployment of advanced telecommunications capabilities in a manner that is inconsistent with Sections 271, 251 or 153. (27-28)
  - Although the Commission has discretion to consider "additional factors" when identifying pursuant to Section 251(d)(2) which network elements ILECs must unbundle, the Commission has no discretion to consider factors that Congress did not intend it to consider. Therefore, the Commission has no discretion to consider whether imposing unbundling

requirements on ILECs may deter investment, because the rest of the Act – including Sections 271, 251(c), 153 and 706 – demonstrates that Congress did not intend for the Commission to consider this factor. (27-28)

- Even if Congress' conclusion were wrong, and it is not, the Commission could not substitute its own assumption that imposing unbundling requirements on ILECs may deter investment. Indeed, "there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits." Therefore, the Commission cannot second-guess Congress here by considering whether imposing unbundling requirements on ILECs may deter investment when applying the necessary and impair standard under Section 251(d)(2). (28)

- Congress added the "at a minimum" language to Section 251(d)(2) to authorize the Commission to make more UNEs available, not less. (28-30)
  - By adding the "at a minimum" language to Section 251(d)(2), Congress authorized the Commission to identify and consider additional factors *after* applying the impair standard when determining which network elements must be unbundled. (29)
  - Congress authorized the Commission to identify and consider additional factors under Section 251(d)(2) so that the Commission can require the ILECs to unbundle network elements that do not satisfy the impair standard where unbundling would further the goals of the Act. (29)
- The Commission cannot forbear from *either* Section 251 or Section 271 until *both* Sections have been fully implemented. (30-31)

- **The Commission should foster broadband deployment as directed by Section 706, which Congress based on the assumption that making UNEs available fosters broadband deployment by facilitating competition. (31-49)**
  - The Commission should encourage efficient investment in broadband infrastructure and services. (31-34)
    - CompTel shares the Commission's goal of fostering the deployment of facilities necessary to provide broadband services, and urges the Commission to achieve this goal by adhering strictly to both the letter and the spirit of the 1996 Act, which Congress designed to promote investment in broadband infrastructure and services ***where it is efficient and cost-effective to do so***. (31)
    - CompTel does not believe that we face a broadband deployment crisis today which justifies draconian regulatory "fixes." (31)

- The low take rate of broadband services is caused by a lack of demand rather than supply, which in turn is a consequence of monopoly pricing and lack of innovation by the ILECs. (31-32)
- To the extent there are any issues in the broadband market today, they are on the "demand" side. CompTel believes that the low take rate of broadband services can be attributed in large part to the high prices and lack of innovation that result from the current paucity of competition in the broadband services market. (32-33)
- The primary flaws in today's advanced services market – monopoly pricing and lack of innovation – are the entirely predictable consequence of permitting the ILECs to abuse their monopoly of the wireline portion of the broadband market. (32-33)
- The best way to ensure optimal broadband supply and demand is to foster a fully competitive telecommunications marketplace, which will create the strongest incentives for all carriers to invest in broadband facilities. (32-33)

- Encouraging broadband investment for its own sake, and not where it is efficient and cost-effective to do so, is misguided and will undermine the nascent broadband market rather than promote its growth. (33)
  - The best way to encourage efficient broadband deployment is to implement fully the market-opening provisions of the Act. (34-40)
  - Broadband deployment is not a "zero-sum game" where the ILECs investment can only be gained at the sacrifice of investment by other service providers. The xDSL market is a good example of how competition will give ILECs a greater incentive to step-up their infrastructure investments in order to prevent the loss of customers to competitors. (34-38)
  - By framing its questions in terms of providing sufficient incentives for broadband investment *by ILECs*, the *Notice* unfortunately reflects the ILECs' view that broadband deployment is a zero-sum game where their investment is gained at the sacrifice of investment by other broadband service providers. CompTel fundamentally disagrees with the ILECs' view. A win-win approach to broadband investment already exists, and it is embodied in the market-opening provisions of the 1996 Act. (34-35)
  - The Commission cannot hope to maximize efficient investment if it implements policies that undermine competition, because history shows that competition is the single greatest spur to ILEC investment. (35)

- The bottom line is that a competitive market environment creates a compelling incentive for ILEC investment that overrides whatever incremental disincentives may be created by UNE requirements and TELRIC rate levels. This leads to the conclusion, which may be counter-intuitive to some, that the ILECs' investment incentives are less when they have larger margins and more unfettered control over their own assets. Therefore, the Commission should foster competition by making ILECs comply with their unbundling obligations under the 1996 Act rather than lessening unbundling obligations based on false claims. (38)
- One of the Commission's most important tools for fostering competition is its ability to enforce the requirements of its rules implementing the Act. Although Chairman Powell has repeatedly emphasized the importance of enforcement as an important tool in effecting competition, the Commission has failed to enforce its own rules effectively. (38)
- The Commission's failure to enforce its rules implementing the market-opening provisions of the 1996 Act or to impose penalties that have any substantial deterrent effect on the ILECs has had a devastating effect on the ability of new entrants to compete effectively. (39)

- The Act permits no distinction between "new" and "old" ILEC investment. (40-43)
  - All ILEC facilities are subject to Section 251, which provides absolutely no basis for distinguishing between "new" and "old" investments. Moreover, ILECs do not build and operate two separate networks, but rather a single, integrated network. (41)
  - Even if the Act permitted the Commission to distinguish between "new" and "old" investments, there is no policy justification for the Commission to adopt separate regulatory regimes for the ILECs' "legacy" and "broadband" networks. (42)
  - Because it is impossible to segregate the "broadband" and "legacy" portions of the ILECs' physical networks in any meaningful way, any policies that seek to impose differing requirements on the ILECs' "broadband" and "legacy" networks would be fatally arbitrary and serve no purpose except to generate expensive litigation and regulatory proceedings as parties seek to clarify, challenge and defend a non-existent (or at best blurred) boundary line between "broadband" and "legacy" networks. (42)
- Granting CompTel's petition for reconsideration of the Line-Sharing Order would facilitate deployment of broadband facilities. (43-48)

- For years, the ILECs have tied their local voice services with their xDSL products. As a result, a customer that wishes to obtain xDSL service from the ILEC while obtaining local voice service from a competing carrier often is rejected by the ILEC. The Commission should take immediate action to end these anti-competitive tying arrangements in order to permit subscribers to obtain xDSL and local voice services from the providers they choose. (43)
    - The Commission should find affirmatively that the "low frequency" portion of the local loop satisfies the definition of the Commission's existing subloop UNE. (43-45)
        - Adopting the ruling sought by CompTel will help to ensure that new entrants needing only a portion of the loops to provide services requested by a consumer are entitled to obtain such access without needing to pay for the entire loop. (44)
    - The Commission should clarify that the ILECs' line splitting obligation applies equally to requesting carriers using the UNE-P and UNE-L entry strategies. (45-48)
        - CompTel also demonstrated the need for the Commission to hold that, to the extent that an ILEC has agreed voluntarily to provide the splitter for line sharing arrangements, the ILEC similarly should be required to provide the splitter for line splitting arrangements. (46)
    - The Commission should clarify that once an ILEC qualifies a loop for DSL service, an ILEC may not assess additional qualification charges on subsequent carriers. (48)
- Ensuring that competitors have access to building would facilitate broadband deployment. (48-49)

- **The Act requires the Commission to perform a thorough impair analysis, not the type of "granular" application discussed in the *Notice*. (49-85)**
    - The language of Section 251(d)(2) requires the Commission to apply the impair standard from the perspective of the requesting carrier, not the ILEC or end users. This requirement has a direct impact on the factors the Commission can consider in applying the impair standard, as well as the way in which the Commission can consider them. Specifically, the Commission can only consider factors that potentially affect the requesting carrier's ability to enter the market and "provide the services that it seeks to offer." Once the Commission identifies a factor that potentially may affect a requesting carrier's ability to enter the market and provide services, it must interpret the record data with respect to that factor from the perspective of the requesting carrier to determine what the data demonstrate, if anything, about the ability

of the requesting carrier to enter the market and provide the desired services. (50-51)

- Factors that do not affect the requesting carrier's ability to enter the market and provide services cannot be considered by the Commission in applying the impair standard. (50-51)
- CompTel fully supports the Commission's efforts to perform a more thorough impair analysis. CompTel has strong concerns about the Commission's proposed "granular" application of the impair standard. In particular, the Commission could violate the letter and the spirit of the 1996 Act if its pursuit of "granularity" leads it astray from the perspective of the requesting carrier. (51)
- Granular application of the impair standard does not reflect the decision-making process for market entry or the provision of services in an ILEC-dominated market. (51)
- Granular application of the impair standard also is impractical from an administrative standpoint. (52)
- The service-by-service application of the impair standard is contrary to the Act. (52-60)
    - The statute requires the FCC to apply the impair standard on a functionality-by-functionality basis, and prohibits the FCC from applying the impair standard on a service-by-service basis. (52)
    - The Supreme Court endorsed the FCC's historic application of the impair standard on a functionality-by-functionality basis. (54)
    - The statutory pricing standard in Section 252(d)(1) also militates against the service-by-service approach. (54)
    - The service-by-service approach shares the defect of the Commission's proposed "granular" approach to impair standard in that it ignores the business requirements of providing services as a new local entrant. (55)
    - The business reality is that a competitive carrier must be able to obtain a functionality once and use it with maximum efficiency, and if *any* of the services it desires to provide over the functionality satisfies the impair standard, then the carrier is legally entitled to obtain the functionality as a mandatory UNE for the provision of any and all services it desires to provide over the UNE. (55-56)
    - The practical infeasibility of a service-by-service approach confirms the clear intent of Congress that the impair standard be applied on an functionality-by-functionality basis. Under a service-by-service approach, the FCC would need to undertake an impairment analysis

for ***all*** network elements for ***every*** possible service that a requesting carrier might seek to offer. The FCC could not possibly complete such a massive undertaking. (56)

- Of course, ultimately a service-by-service approach would be implemented not by the FCC, but by the ILECs as they stifled competitive entry with a series of unilateral and arbitrary decisions as to which entrants may obtain which UNEs to provide which services. (57)
- The service-by-service approach to the impair standard also must be rejected because it would stifle innovation and the development of new services. (58)
- The level of *competition* for a particular *service* is legally and empirically irrelevant to the impair inquiry for *unbundled network elements*. (59)
- If anything, Congress' decision not to include the word "local" in Section 251 shows that it intended for UNEs to be more broadly available through Section 251 than as a checklist item for Section 271. (59)

- The Act requires the Commission to focus on impairment from the perspective of the requesting carrier, not the ILEC or the end users. (60-61)
  - The plain language of Section 251(d)(2) requires the Commission to apply the impair standard from the perspective of the requesting carrier, not the ILEC or the end users. (60)
  - The decision by Congress to require the Commission to perform the impair analysis solely from the perspective of the requesting carrier makes complete sense. In order to encourage additional carriers to enter the telecommunications marketplace, decisions about unbundling must focus on the perspective of the potential new market entrant. (60)
  - The Commission cannot apply the impair standard based solely upon a count of facilities. (61-64)
    - Rather than simply counting network elements owned by competitive carriers, the Commission must determine whether requesting carriers can obtain access to those network elements on a wholesale basis (*i.e.*, are the installed network elements available at wholesale rates), or whether requesting carriers can self-provision without impairment. (61)
    - Many switches deployed in an area are not available on a wholesale basis to competitors and many belong to carriers that are now bankrupt. (61-64)

- Similarly, it is inappropriate to rely on LERG data to compile a switch count as some parties urge the Commission. (62)
- The Commission should focus on the existence of a viable wholesale market as key evidence in deciding whether a UNE should be on the mandatory list. Although the Commission in the *UNE Remand Order* rejected the argument that a wholesale market must exist before a new entrant would not satisfy the impair standard, it did so based upon the misapprehension that the existence of a wholesale market is unrelated to the feasibility of self-provisioning a particular functionality. In fact, the existence of a wholesale market is the best evidence that a functionality can be feasibly self-provisioned. (63)

- The Commission should not consider the availability of tariffed offerings when applying the impair standard. (64-65)
- The Commission must consider the state of the capital markets when applying the impair standard. (65-71)
  - CompTel strongly agrees with the Commission's stated intent to take into account evidence of actual marketplace conditions in determining whether competitive carriers are impaired without access to UNEs. (65)
  - The Commission must consider the state of the capital markets as part of its impair analysis. In this case, CompTel submits that based on the current state of capital markets in the United States, self-provisioning of any UNE is inherently infeasible for a brand-new entrant and for many existing entrants. As a result, the Commission cannot lawfully consider self-provisioning as an option for requesting carriers when applying the impair standard. (65)
- The Commission must consider profitability in determining whether a competitive carrier can self-provision. (71-73)
  - The Commission cannot consider the existence of self-provided functionalities in the marketplace today as evidence of the feasibility of self-provisioning without taking into account whether the entrants engaging in self-provisioning have done so with a sufficient level of profitability. (71)
  - Should the Commission examine past examples of self-provisioned functionalities as potential evidence that self-provisioning is feasible, the Commission must determine whether such activities were undertaken profitably. If not, existence of past experiments in self-provisioning that failed to produce a viable business operation does not justify the

removal or paring back of the UNE list, particularly given the dramatic changes in capital markets over the past several years. (71-72)

- While the facilities that such entities purchased or built may still remain in the industry, the fact, in and of itself, cannot be regarded as evidence that new entrants have the "ability" to provide the services that they seek to offer through self-provisioning. (73)

- The Commission must consider the amount of disruption that would occur if a UNE is removed from the national list in applying the impair standard. (73-75)
  - To the extent that competitive carriers are now using a UNE, the Commission should consider when applying the impair standard the burden and disruption that removing or restricting a UNE would cause, particularly in today's difficult economic conditions. (74)
  - The removal of a network element from the mandatory UNE list could trigger a chain reaction that would force many viable carriers into bankruptcy or insolvency. (74)
  - Apart from the potential effect that removal of a UNE could have on the financing of competitive carriers, removal of a UNE could severely harm the many competitive carriers that have invested large sums of capital in reliance on the existence of certain UNEs – marketing, customer bases, back-office systems. (75)

- Granular application of the impair standard would be too administratively burdensome. (75-76)
  - The Commission does not have the administrative resources to pursue a granular application of the impair standard. (75-76)

- The Commission cannot remove UNEs or impose restrictions on UNEs based on putative concerns about universal service or access charges. (76-77)
  - There is no empirical or policy basis for the Commission to remove UNEs or to adopt UNE restrictions to address putative concerns about universal service or interstate access charges. There are no implicit universal service subsidies in the ILECs' special access charges. (76)

- The ILECs must modify their networks in order to provide access to UNEs. (77-78)
  - CompTel encourages the Commission to impose affirmative duties on ILECs insofar as it will help them to comply with their obligations

under the Act. Although ILECs may not need to engage in new construction of network facilities, the Commission should require them to undertake affirmative obligations so that the Act works as Congress intended. (78)

- The Commission should adopt UNE policies that promote the public interest in ensuring that our Nation's telecommunications networks are protected against terrorist activities. (78-83)
    - CompTel believes that national security requires the Commission to adopt policies, consistent with the Communications Act of 1934, to promote alternative infrastructure investment by non-incumbent carriers. (79)
    - By promoting non-incumbent investment, the Commission can maximize the efficient development of the type of network infrastructure necessary to minimize the impact of terrorist attacks upon the United States. The question the Commission must ask is what policies will assist non-incumbent carriers in developing alternative facilities and networks. (79)
    - In adopting policies to limit our nation's vulnerability to terrorism, the Commission should recognize that non-incumbent carriers have natural incentives to minimize their reliance upon the ILECs' monopoly networks. (79)
    - It should be noted that the development of competitive alternatives over the past five years played a major role in helping our nation cope with and recover quickly from the terrorist attacks of September 11. (80)
    - Investment by non-incumbent carriers is especially important because these entities have the incentive to aggressively explore and implement "disruptive" technologies. (81)
    - One of the benefits of soft switch technology is that it mitigates and disperses the choke points in the network. (81)
    - This technology has obvious implications for public telecommunications network security, and the only way to ensure the implementation of this technology is to establish incentives for further investment by non-incumbent carriers. (81)
    - By contrast, future ILEC investment will not make our nation less vulnerable to terrorist attacks. Unlike competing carriers, the ILECs have no natural incentives to maximize the development of alternative networks or to deploy "disruptive" technologies, such as DSL or soft switches, which minimize the value of embedded plant. (81)
- The Commission should not adopt temporal restrictions on UNEs. (83-85)

- CompTel strongly opposes any UNE "triggers" and "sunsets." (83)
- The Commission does not have any empirical basis for predicting years in advance when a particular functionality will no longer satisfy the impair standards. (83)
- The Commission appears to be targeting the UNE Platform as a candidate for being phased through triggers or sunsets. There is no empirical basis to believe that there is a "magic number" of customers after which it will always be feasible in every ILEC's region in every state for a UNE-P carrier to migrate subscribers to its own facilities. (84)
- Triggers and sunsets also have a significant adverse impact on a new entrant's ability to attract capital from Wall Street and other sources of financing because a new entrant has a smaller window of opportunity to succeed given the application of triggers and sunsets that significantly and negatively affect their business plans. (83-85)

- **The ILECs have not presented any facts to support a finding that specific UNEs no longer meet the statutory standard. (85-88)**
  - The Triennial Review is not a reconsideration proceeding. (85-86)
    - The ILECs bear the burden of justifying any proposed changes to the established rules. (85)
    - The Commission should not, and indeed cannot, treat this as a reconsideration proceeding. The deadline for filing petitions for reconsideration of the impair standard expired on February 17, 2000. (85)
  - The current UNEs and UNE Combinations, including UNE-P, should be maintained. (86)
    - CompTel believes strongly that each and every network element that is currently on the national UNE list should remain on the list. None of the current UNEs can be self-provisioned by competitive carriers without causing them severe cost, delay and operational degradation. Likewise, none of the current UNEs, including dedicated transport, is sufficiently available from alternative providers such that competitive carriers come remotely close to matching the quality, ubiquity, cost structure or efficiency that the ILECs currently enjoy and have enjoyed for decades. (86)
  - UNEs should not be removed from the national list prior to full compliance by the ILECs with the unbundling requirements. (86-87)
    - The ILECs' refusal to comply with their statutory obligations should not be rewarded by the Commission's removal of individual UNEs

from the mandatory list. Rather, no UNEs should be removed until the ILECs have provided that UNE for a commercially reasonable period of time. This rule is important for several reasons. (86-87)

- First, it provides the ILECs with a necessary incentive to perform their statutory obligations, both now and in the future. (86)
- Second, the industry experience with a UNE is distorted if the UNE is not made available as required by law. (87)

- The Commission should not retain the three-year periodic review cycle. (87-88)
  - The ILECs will continue to abuse the system and avoid their statutory obligations if they believe the Commission will take UNEs off the mandatory list every three years. Therefore, the Commission should do away with its three-year periodic review cycle and adopt a policy of periodic internal review, requesting outside comments only when the Commission believes changes are necessary. (87-88)
  - Section 11 does not require the Commission to engage in a full review of UNEs and the UNE framework every other year. (88)
  - The Commission can satisfy the requirements of Section 11 by performing its own internal review, and requesting comment only where the Commission believes that changes are necessary. (88)

- **The Commission should declare that enhanced extended links ("EELs") are stand-alone UNEs. (88-90)**
  - The Commission should adopt a rule that the EEL is a stand-alone UNE, in addition to qualifying as a UNE combination, because it satisfies the definition of a UNE on its own. (88)
  - There is precedent for treating an EEL as a stand-alone UNE even though it is comprised of two distinct UNEs. (89)
  - CompTel believes it is important to regard the EEL as more than just a UNE combination because it affects how the impair standard applies. (89)

- **The Commission should immediately bring the current rules into compliance with the Act. (90-103)**
  - The Commission should immediately lift the use restrictions on EELs. (90-95)
    - UNE restrictions are contrary to the Act. (90-93)
      - Restrictions on the services which UNEs may be used to provide are inconsistent with, and prohibited by, the statutory language of the 1996 Act. (90)

- These provisions entitle any requesting carrier to obtain and use any mandatory UNE for the provision of any telecommunications service, and they leave no room for FCC regulations limiting UNEs to particular services or restricting access to UNEs based on the services that the carrier offers. (91)

- Use restrictions do not promote any valid public policy objectives. (93-95)
  - There is no legitimate policy objective which supports use restrictions. (93)
  - Nor is it permissible for the FCC to adopt restrictions in order to protect specific competitors or a specific class of competitors. (93)
  - It is equally indefensible for the FCC to suggest that UNE restrictions are necessary for the ILECs to maintain supra-competitive special access rates as a pricing umbrella for facilities-based entrants. (94)
  - At bottom, any decision to impose restrictions on UNEs in order to bolster above-cost pricing by ILECs or other competitors is an attack on the TELRIC pricing methodology established in Section 252(d)(1). (94-95)
  - The Commission has recognized that if ILECs were allowed to charge rates that exceed TELRIC, new entrants' investment decisions would be distorted, and would lead to inefficient entry and investment decisions. (95)

- The Commission should lift the co-mingling and collocation restrictions on EELs. (95-99)
  - The Commission should eliminate the co-mingling prohibition because it has often prevents new entrants from obtaining EELs to provide any telecommunications services whatsoever. (96)
  - The co-mingling prohibition is harmful to competition because it effectively forces competitive carriers to build and operate two duplicate, inefficient networks – one for EELs traffic, another for non-EELs traffic – in order to qualify to use EELs. (97)
  - The co-mingling policy bears no discernible relationship to the Commission's ostensible goal of limiting EELs to new entrants providing a significant amount of local traffic. (97)

- Any possible concern that the co-mingling prohibition is necessary to ensure that carriers cannot apply UNE rates for non-EELs traffic is misplaced. (97)
- The Commission should remove the restriction in two of its three EELs safe harbors that require the EEL to terminate in the requesting carrier's collocation arrangement. This requirement is a regulatory anomaly, and no longer serves any permissible purpose. (98)

- The Commission should eliminate the switch carve-out. (99-103)
  - This so-called switch carve-out violates the statutory UNE regime and should be eliminated in its entirety. The Commission should require all ILECs to provide unbundled local switching as a mandatory UNE nationwide. (99)
  - The FCC's apparent willingness to consider a residential cut-off – that is, permitting ILECs to refuse to provide unbundled local switching for the provision of services to business customers – is an unfortunate byproduct of the FCC's misguided granularity approach. (99)
  - Ironically, the result of adopting the residential/business split would be to severely harm the very residential consumers that the FCC claims to desire to protect. (100)
  - State commissions have concluded that eliminating the FCC's unbundled local switching restriction is necessary for meaningful competition to flourish. (101)
  - The focus of the impair inquiry under Section 251(d) is whether denial of access to a functionality would impair a carrier's ability to provide the "services" that it seeks to offer. (102)
  - The Commission has refused to act on numerous petitions for reconsideration on the switch carve-out issue (including one filed by CompTel) for approximately two years. (103)

- **The Commission should convene a Federal-State Joint Conference on UNEs. (103-07)**
  - Because the industry's experience with the current UNE regime will vary from state to state, and because state regulators' experiences and perspectives will be invaluable to determining which UNEs satisfy the impair standard, the Commission should convene a federal-state joint conference to facilitate, inform and coordinate its implementation of the triennial UNE review. (103-05)
  - The data-intensive nature of the three-year review underscores the need for a Joint Conference on UNEs. (104)

- Feedback from states is critical given the fact- and state-specific nature of the issues under consideration, and in many cases, states have imposed additional unbundling obligations using their own authority or through application of the Commission's standards. (105-06)
- If for any reason the Commission declines to convene a Federal-State Joint Conference on UNEs pursuant to section 410(b) of the Act, CompTel urges the Commission to grant the pending petition of the Promoting Active Competition Everywhere ("PACE") Coalition. It is crucial that the states have a strong role in determining which network elements the ILECs must make available on an unbundled basis pursuant to Section 251(c)(3). (106)
- CompTel urges the Commission to reaffirm that state commissions continue to have the authority under Section 251(d)(3) of the Act to impose unbundling requirements that exceed those imposed by the national UNE list. (107)

- **The Commission should adopt reasonable transition rules for removal of UNEs from the national list. (107-10)**
  - The Commission should adopt a transition plan to slowly phase out UNEs that the Commission determines should no longer be unbundled. A "phase out" period would allow competitive carriers to reconfigure their operations and obtain alternative network arrangements, if necessary, without disruption of service to customers. (107-09)
  - The Commission should adopt additional protections for competitive carriers that are forced to transition from a UNE that is removed from the national list. Such protections should include the right to petition the Commission for a waiver of any determination to remove a UNE from the national list, and a waiver of all reconfiguration, early termination and non-recurring charges. (109-10)

Attachments: *Viability Analysis Chart*

Chart of Unresolved Complaints Concerning RBOC Merger Violations

Letter by H. Russell Frisby Jr. (CompTel) to President George Bush, dated October 3, 2001, summarizing efforts by CompTel members in the wake of the terrorist attacks on September 11, 2001.

Viability Analysis

Currently Solvent		Symbol	(A) 1 9 9 9 Stock Price Nov-99	(A) 1 9 9 9 Market Cap $mil	(B) 2 0 0 2 Stock Price Mar 18-02	(B) 2 0 0 2 Market Cap $mil	(C) Installed Lines (000s) Est 10/01	(D) 2002 Rev Est ($Mil)	(E) 2001 Earnings est ($Mil)	(F) Proj 2002 EBITDA	(G) Proj 2002 Capex ($Mil)	(H) Proj Debt Service ($Mil)	(I) Proj 2001 Burn (F)+(G)+(H)	(J) Cash ($Mil)	(K) Other Avail Capital ($Mil)	(L) Total Avail Capital ($Mil) (J)+(K)	(M) Debt ($Mil)	(N) # Months Cap Avail based on 2001 Burn (L)/(I)*12
CLEC/DLEC																			
Z-Tel		ztel	$35 00	$1,155	$2 40	$82	380	$240	-146	-$10	-$12	-$2	-$24	$20	na	$20	$16	10 0
Choice One* ipo 3/00		cwon	$30 00	$1,130	$1 70	$69	211	$345	-100	$10	-$50	-$40	-$80	$70	$55	$125	$475	18 7
USLEC		clec	$27 50	$770	$3 40	$89	na	$50	-77	-$15	-$45	-$14	-$74	$70	$0	$70	$150	11 4
CTC Com		cptl	$10 00	$268	$2 50	$68	589	$367	-125	$28	-$60	-$26	-$58	$73	$40	$113	$286	23 5
ITC		itcd	$25 00	$1,550	$0 37	$23	283	$470	-212	$50	-$125	-$72	-$147	$41	$80	$121	$760	9 9
RCN Corp		rcnc	$50 00	$4,925	$1 50	$146	541	na	na	-$175	-$650	-$190	-$1,015	$839	$250	$1,089	$1,900	12 9
Allegiance		algx	$50 00	$5,672	$3 50	$407	734	$775	-432	-$29	-$300	-$118	-$447	$538	$150	$688	$983	18 5
Time Warner Telco		twtc	$29 00	$3,335	$7 60	$868	na	$900	-81	$200	-$400	-$106	-$306	$384	$750	$1,134	$1,064	44 4
Covad	filed Ch 11 08/01 came out 1/02		$35 00	$4,935	$1 76	$315	300	na	-600	na	na	na	na	na	na	na	na	na
Pac-West		pacw	$20 00	$720	$0 49	$18	229	$175	na	$27	-$40	-$22	-$35	$78	$40	$118	$180	40 3
Total				**$24,460**		**$2,085**	**3,267**	**$3,322**		**$86**	**-$1,682**	**-$590**	**-$2,186**	**$2,113**	**$1,365**	**$3,478**	**$5,814**	**19.1**
Value Destroyed ($ Millions)						**-$22,375**												
Next Generation Carriers and Traditional Long Distance																		
Qwest		q	$35 00	$58,217	$16 07	$26,730	na	$19,000	-3,500	$7,100	-$8,000	-$1,920	-$2,820	$400	$4,000	$4,400	$24,000	18.7
Worldcom		wcom	$60 00	$177,393	$13 12	$38,790	na	$35,000	2,100	$8,211	-$7,500	-$1,837	-$1,126	$1,500	$8,000	$9,500	$26,237	101.3
Level 3	lvlt		$75 00	$30,672	$3 46	$1,415	na	$1,391	na	$50	-$1,250	-$518	-$1,718	$1,500	$650	$2,150	$5,750	15 0
American Telephone & Telegraph		t	$34 00	$120,199	$15 40	$54,443	na	$55,000	-4,000	$15,250	-$8,600	-$3,900	$2,750	$11,000	$14,700	$25,700	$52,000	nm
Alltel		at	$48 00	$14,890	$57 25	$17,760	na	$8,000	890	$3,300	-$1,250	-$351	$1,699	$85	$800	$885	$3,900	nm
Total				**$401,372**		**$139,138**		**$118,391**		**$33,911**	**-$26,600**	**-$8,525**	**-$1,214**	**$14,485**	**$28,150**	**$42,635**	**$111,887**	**421.4**
Value Destroyed ($ Millions)						**-$262,234**												
Bankrupt/Take Under/ ON THE BRINK																		
Ch11																		
Net2000	filed Ch 11 11/01		$30 00	$1,200	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Teligent	filed Ch 11 5/01		$56 50	$3,108	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
GSTX	Assets acquired by TWTC 1/01		$10 00	$375	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Nettel	na		na	na	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
ICG Com	Filed ch 11 11/00		$19 00	$874	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Northpoint	Filed ch 11 1/01 T acquired assets		$28 00	$3,528	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Prism	filed Ch 11		na	na	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Rhythms	filed Ch 11 8/01 WCOM acq assets		$35 00	$2 800	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Winstar	filed Ch 11 4/01 IDT acq assets		$33 00	$2,772	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
E spire	filed Ch 11 3/01		$7 40	$377	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Advanced Radio	filed Ch 11		na	na	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Viatel	filed Ch 11 05/01		na	na	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Global Crossing	filed Ch 11 01/28/02		$40 00	$35,400	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
McLeod USA	filed Ch 11 01/31/02		$15 00	$9,375	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Network Plus	filed Ch 11 02/05/02		$18 00	$1,260	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
On the Brink																		
Adelphia Bus Sol	abiz		$30 00	$4 032	$0 08	$11	na	$110	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
ELEC Com	Selling select assets		$1 80	$30	$0 11	$2	15	$8	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Williams Com	2/25 considering ch 11		na	na	$0 13	$64	na	na	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
XO Com	Announced -seeking bh approv for ch11		$30 00	$12,900	$0 07	$31	na	na	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Mpower Com	Announced -seeking bh approv for ch11		$20 00	$1,200	$0 05	$3	325	na	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Electric Lightwave	delisting imminent		$15 00	$765	$0 42	$22	195	$200	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Focal Com	Reverse split		$20 00	$1,250	$4 50	$21	501	$350	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Metro Media Fiber	3/18 - considering filing ch 11		$20 00	$12,142	$0 09	$70	na	$511	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Cypress Com	cyco - 10 1 reverse stock split		na	na	$3 46	$17	na	$5	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Take Under																		
Allied Riser	ARCC - merging with Cogent		$20 00	$1,120	na	na	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
CapRock	Acquired by McleodUSA		$15 00	$495	na	na	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Intermedia	Acquired by WCOM		$20 00	$1,036	na	na	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm	nm
Total (Bankrupt $ Millions)				$96,039		$241	1,036	$1,184										
Value Destroyed ($ Millions)						**-$95,798**												
TOTAL VALUE ($ Millions)				**$621,871**		**$141,464**												
TOTAL LOST VALUE ($ Millions)						**-$380,407**												

Footnotes

(A)	Source Bloomberg
(B)	Source Bloomberg
©	SEC Filings & Baird & Co.October 2001 Integrated Communication Service Providers "Convergence, Highlights of the Converging Communications Sector"
(D) - (G)	SEC Filings, press releases, & various Wall Street Analyst reports.
(H)	In House estimate based on 2nd quarter 2001 corporate 10q's blended debt rate on debt principal
(I)	Projected Burn Rate Sum of (EBITDA + Interest Expense + Cap Exp) (F)+(G)+(H)
(J)	SEC Filings, press releases, & various Wall Street Analyst reports
(K)	SEC Filings, press releases, & various Wall Street Analyst reports.
(L)	Total Available Capital = Cash on hand + Credit facilities (J) + (K)
(M)	Company 3rd quarter 2001 10q
(N)	Capital Availability is defined as Total capital available divided by projected annual burn rate This is multiplied by 12 to estimate number of months of available capital This analysis assumes no operational improvements or changes for 2002 Hence some of these estimates may deviate from what Wall Street analysts project This assumes no principal debt or debt interest payment restructuring, nor any increase in credit lines, improvement to operational cash flow, nor any asset sales.

FCC Complaints Concerning RBOC Merger Violations

RBOC	MERGER AUDIT	COMPLAINTANT	DATE	ISSUE(S)	STATUS
Verizon	N/A	Covad	March 5, 2001	Verizon's unilateral elimination of an FCC-mandated discount for loops used to provide advanced services.	Open
Verizon	Collocation, Unbundled Network Element and Line-Sharing Audits (filed January 29, 2001)	WorldCom	March 20, 2001	1. Verizon failed to comply with several of the FCC's collocation requirements and discriminated to the advantage of its advanced services affiliate (i.e., Verizon did not charge the affiliate collocation fees or bill the affiliate for collocation space) 2. Verizon did not correctly bill wholesale customers for network facilities. 3. Verizon did not demonstrate to the relevant state commissions that it was necessary for Verizon to reserve dark fiber in its network. 4. Verizon provided its own employees with detailed loop information on an electronic basis, whereas Verizon only provided non-affiliated carriers with this information on a manual basis.	Open
Verizon	Genuity Audit (June 1, 2001)	AT&T	June 28, 2001 and August 8, 2001	1. Verizon is Genuity's sole supplier of debt capital, in violation of merger conditions that limit Verizon's holdings to no more than 25 percent of the total outstanding debt of Genuity. 2. Verizon is providing Genuity with preferential treatment due to its failure to (a) charge Genuity commercially reasonable rates; and (b) bill and collect outstanding debts from Genuity.	Open

FCC Complaints Concerning RBOC Merger Violations

				3. Verizon withheld information from the auditor. 4. Verizon's management did not provide an assertion regarding Verizon's discrimination in favor of Genuity in the provision of high-speed access and regular special access services because Verizon unilaterally decided that this was not required.	
Verizon	Genuity Audit (filed June 1, 2001)	WorldCom	June 26, 2001	Same as issues 2-4 above.	Open
Verizon	Advanced Services Affiliate & General Merger Conditions Audits (filed June 18, 2001 and June 1, 2001, respectively)	CompTel	August 6, 2001	1. Verizon provided its advanced services affiliate with free line-sharing for the period July 2000-April 2001. 2. Verizon provided its advanced services affiliate with access to operations support systems that were not available to other carriers. 3. Verizon misreported or failed to report carrier-to-carrier performance data. 4. Verizon failed to provide other carriers accurate and timely wholesale discounts mandated by the merger conditions.	Open
Qwest	Qwest-US WEST Merger Audit (April 16, 2001)	AT&T	May 1, 2001	Qwest provided in-region, interLATA private line services to 266 customers, which violates both the US WEST-Qwest merger conditions and section 271 of TA-96.	Open
Qwest	Qwest-US WEST Merger Audit (April 16, 2001)	WorldCom	May 14, 2001	Same as above	Open
Qwest	Qwest-US WEST Merger Audit (April 16, 2001)	CompTel	May 16, 2001	Same as above	